UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

United States Securities and Exchange Commission	:	
v.	:	**Civil No. 1:15-cv-699 (TMR)**
William M. Apostelos **OVO Wealth Management, LLC** **WMA Enterprises, LLC** **Midwest Green Resources, LLC,**	:	
Defendants, and	:	
Connie Apostelos **Apostelos Enterprises, Inc.** **Coleman Capital, Inc.** **Silver Bridle Racing, LLC,**	:	
Relief Defendants.	:	

UNITED STATES' MOTION FOR LEAVE TO INTERVENE AND FOR STAY OF DISCOVERY PENDING RESOLUTION OF PARALLEL CRIMINAL PROCEEDINGS

The United States of America, by and through its attorney, Carter M. Stewart, United States Attorney for the Southern District of Ohio, and the undersigned Assistant United States Attorney, respectfully seeks to intervene in this action pursuant to Federal Rule of Civil Procedure 24 for the limited purpose of moving to stay discovery pending resolution of the parallel criminal case pending in this court, *United States v. William M. Apostelos & Connie M. Apostelos*, 3:15-cr-148 (TMR), that addresses the same alleged misconduct. The Securities and Exchange Commission does not oppose the United States' motion to intervene and request for a stay of discovery. As of the date of this filing, the United States is not aware of the individual defendants retaining counsel in the civil case. Because of the pending criminal charges against William and Connie Apostelos, the United States has not sought their consent in the filing of this motion and requested relief.

BACKGROUND

On October 29, 2015, a grand jury in the Southern District of Ohio returned a twenty-seven count indictment against William and Connie Apostelos charging them (and others known to the grand jury) with running a multi-year fraudulent investment scheme (a Ponzi scheme) between 2009 and March 2015 that resulted in hundreds of investors losing over thirty million dollars. (3:15-cr-148, R. 6, Indictment, 40-71.) Specifically, the Indictment alleges that William and Connie Apostelos "fraudulently induced hundreds of investors from around the country to invest collectively over $70 million in funds with [William Apostelos]." (*Id.*, 41.) In particular William and Connie Apostelos "falsely advised investors that all of the investors' money would be used for investment purposes, including, but not limited to: acquiring stocks or securities; purchasing real estate or land; providing bridge loans/hard money loans to businesses; and buying precious metals such as gold and silver." (*Id.*, 43.) William and Connie Apostelos also falsely told their various clients that their funds had been invested through various investment vehicles, including purported Ameritrade Stock Accounts (*id.*, 43-44), land deals in Kentucky and Nevada (*id.*, 44), purported short-term bridge/hard money loans in which businesses needed "brief, but urgent, cash infusions to purchase properties or complete business projects" (*id.*, 45), purported precious metals investments (*id.*, 45-46), purported management of at least one business' 401K plan (*id.*, 46) , and the purported creation of a bank. (*Id.*, 46-47.) Instead of investing their clients' monies as promised, the Indictment alleges that William and Connie Apostelos (and others known to the grand jury) "intentionally diverted their funds for illegal and improper purposes, including, but not limited to, the operation of a 'Ponzi' scheme." (*Id.*, 47.) The Indictment thus alleges that William and Connie Apostelos "fraudulently diverted a substantial portion of this money and used it to make purported investment payments to earlier investors" (*id.*, 47); "improperly used client funds to finance and operate their . . . various personal business ventures" (*id.*, 47-48); and "improperly diverted client funds for their personal benefit." (*Id.*, 48.)

William Apostelos and Connie Apostelos were charged in Counts 1 through 26 of the Indictment, which alleges Conspiracy to Commit Wire Fraud, in violation of 18 U.S.C § 1349 (Count 1), Mail Fraud, in violation of 18 U.S.C. § 1341 (Counts 2 through 9), Wire Fraud, in violation of 18 U.S.C. § 1343 (Counts 10 through 23), Embezzlement from an Employee Benefit Plan, in violation of 18 U.S.C. § 664 (Count 24), and Money Laundering, in violation of 18 U.S.C. § 1957 (Counts 25 and 26). Connie Apostelos was also charged in Count 27 with making a false statement to a federal investigator, in violation of 18 U.S.C. § 1001.

On the same day that the grand jury returned the Indictment against William and Connie Apostelos, the SEC filed a civil complaint in the Southern District of Ohio against these same defendants, together with a number of corporate entities that they allegedly operated and controlled (including William Apostelos' "investment companies" – WMA Enterprises and Midwest Green Resources). *See SEC v. William Apostelos, et. al.* (No. 1:15-cv-699) (R. 1, Complaint, 1-30.) The SEC's action is based on essentially the same conduct underlying the criminal case, and its central allegations are virtually identical to those in the Indictment. (R. 1, Complaint, 9 (¶ 36 (outlining William Apostelos' alleged material misrepresentations and various investment vehicles made to WMA investors)); 12 (¶ 51 (outlining William Apostelos' alleged material misrepresentations made to Midwest Green's investors)); 13-16 (¶¶ 55-66 (alleged fraudulent investment through pooled investment account with a well-known broker-dealer, including the fact that William Apostelos "did not inform most investors that the Trading Software merely simulated stock trading and that there was no real money associated with the account shown on the trading software")).) The SEC's complaint also alleges that William Apostelos and Connie Apostelos misappropriated and misused investors' funds by using them to pay earlier investors and promoters, and for their own personal expenses. (*Id.*, 18-19 (¶¶ 76-79).)

ARGUMENT

A. The Court should permit the United States to intervene for the limited purpose of moving for a stay.

Pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, any party may intervene as of right when the applicant "claims an interest relating to the property of transaction that is the subject of the action, and is so situated that disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The Sixth Circuit has interpreted this Rule to require an applicant to show that: "1) the application was timely filed; 2) the applicant possesses a substantial legal interest in the case; 3) the applicant's ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately represent the applicant's interest." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011) (citing *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999)). The United States can readily satisfy this standard.

First, there has been no litigation in the civil case – this matter was filed just a few months ago – and the defendants have yet to even file their answers or, alternatively, motions to dismiss. (1:15-cv-699, R. 14, Mot. for Continuance to File Answer by Connie Apostelos; R. 15, Mot. for Continuance to File Answer by William Apostelos.) *See also, e.g.*, *SEC v. Mutuals.com, Inc.*, 2004 U.S. Dist. LEXIS 13718, at *3 (N.D. Tex. July 20, 2004) (government's motion to intervene not untimely where it was filed within a few months of the filing of civil complaint and prior to discovery commencing). *Second*, the United States (*i.e.*, the Department of Justice through the United States Attorney's Office for the Southern District of Ohio), has a direct and substantial interest in the subject matter of this litigation, which is the same subject matter underlying the United States' prosecution in *United States v. William M. Apostelos & Connie M. Apostelos*, 3:15-cr-148 (TMR). Specifically, the United States has a substantial legal interest in this case, namely, a "discernable interest in intervening in order to prevent discovery in a civil case from being used to circumvent the more limited scope of discovery in the criminal matter." *SEC v. Chestman*, 861 F.2d 49, 50 (2d Cir. 1988) (denying appeal of district court order that allowed intervention and stayed SEC enforcement action in favor of the criminal case); *see also Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962); *Bureerong v. Uvawas,* 167 F.R.D. 83, 87 (C.D. Cal. 1996). *Third*, "discovery in the . . . civil suit may impair the [United States'] right to more limited discovery in the related criminal case because the scope of discovery in a civil case is broader than in a criminal case." *Mutuals.com*, 2004 U.S. Dist. LEXIS 13718, at *4. "[T]his broader discovery may impair the intended balance between the parties in the criminal case. *Id.,* at *5 (citation omitted). In short, without the United States' intervention, it cannot protect its interest in the criminal prosecution, because it cannot weigh in on whether civil discovery should proceed. No current party to the civil action is in a position to do so either.[1]

The Court may also permit intervention where the applicant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). A party may intervene under this section if it establishes that

[1] Several courts have recognized that even though the civil case has been brought by an agency of the federal government – the SEC – it cannot adequately protect the interests of the United States in the prosecution of the parallel criminal matter. *See, e.g.*, *Mutuals.com*, 2004 U.S. Dist. LEXIS 13718, at *5 ("The SEC must comply with discovery requests that are proper under the civil rules despite the fact that they would be improper under the more limited discovery rules that govern criminal cases. The SEC cannot adequately protect the government's interest because it does not have the same right to invoke the criminal rules that the government has."); *SEC v. Downe*, 1993 U.S. Dist. LEXIS 753, at *44 (S.D.N.Y. Jan. 26, 1993) ("[E]ven though the SEC is involved in this action, the United States Attorney may have an interest in this litigation which is qualitatively different from the SEC's interest.").

there is a common question, an independent ground for jurisdiction and a timely motion. As detailed above, the United States' motion is timely and there are common questions of law or fact exist between the criminal and civil actions—both cases arises from the same alleged fraudulent investment scheme. Moreover, permissive intervention is proper here because such intervention will not unduly delay or prejudice resolving the civil case and because the interests of the United States cannot be adequately represented by the existing parties. *See, e.g.*, *Telexfree*, 52 F. Supp. 3d at 352 n.2.

Finally, "[i]t is well-established that the United States Attorney may intervene in a federal civil action to seek a stay of discovery when there is a parallel criminal proceeding, which is anticipated or already underway, that involves common questions of law or fact." *SEC v. Downe*, 1993 U.S. Dist. LEXIS 753, at *44 (S.D.N.Y. Jan. 26, 1993) (citations omitted); *see also SEC v. TelexFree, Inc.*, 52 F. Supp. 2d 349, 352 n.2 (D. Mass. 2014) (noting that a "finding [that two matters are nearly identical] alone is sufficient to satisfy the requirements of permissive intervention").

B. The Court should stay discovery in the civil case pending resolution of the parallel criminal case.

It is "clearly within the power of the district court to balance 'competing interests' and decide that judicial economy would best be served by a stay of civil proceedings." *United States v. Mellon Bank, N.A.*, 545 F.2d 869, 872-73 (3d Cir. 1976) (affirming stay); *see generally Landis v. North Am. Co.*, 299 U.S. 248, 254-55 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."); *Degen v. United States*, 517 U.S. 820, 826 (1996) ("[T]he District Court has its usual authority to manage discovery in a civil suit, including the power to enter protective orders limiting discovery as the interests of justice require. Decisions in the Courts of Appeals have sustained protective orders to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases.").

Among the factors that courts generally consider in deciding whether to stay a civil case pending resolution of a criminal matter, include (a) the extent to which the civil and criminal cases overlap; (b) the public interest; (c) any potential prejudice to the parties if the civil case is stayed; (d) the court's interest in managing dockets and resources; and (e) the current status of the criminal case.[2] Each of these factors weighs in favor of granting the United States' requested stay.

1. ***The civil action should be stayed because the facts and evidence overlap.***

"[T]he most important factor [in considering whether to stay a civil case because of a pending criminal case] is the degree to which the civil issues overlap with the criminal issues." *SEC v. Nicholas*, 569 F. Supp. 2d 1065, 1070 (C.D. Cal. 2008) (permitting DOJ intervention and staying SEC action pending resolution of

[2] *See, e.g.*, *Keating v. Office of Thrift Superv.*, 45 F.3d 322, 324–25 (9th Cir. 1995); *Chao v. Fleming*, 498 F. Supp. 2d 1034, 1037 (W.D. Mich. 2007); *In re Adelphia Comm. Sec. Litig.*, 2003 WL 22358819, *3 (E.D. Pa. May 13, 2003); *SEC v. HealthSouth Corp.*, 261 F. Supp. 2d 1298, 1326 (N.D. Ala. 2003); *Javier H. v. Garcia-Botello*, 218 F.R.D. 72, 74 (W.D.N.Y. 2003); *Walsh Sec. v. Cristo Prop. Mgt.*, 7 F. Supp. 2d 523, 526-27 (D.N.J. 1998).

criminal cases) (citations omitted); *see also Telexfree*, 52 F. Supp. 3d at 352 (citations omitted).

As described above, the criminal and civil actions are substantively identical: they are both predicated on William and Connie Apostelos allegedly operating a multi-year Ponzi scheme that resulted in investors losing millions of dollars. The actions cover substantially the same time period, investors, investment vehicles and investment entities. Accordingly, the two cases will necessarily rely upon the same key witnesses and documentary evidence. *See id.* at 352 (granting United States' motion to stay discovery in part because the civil and criminal cases "certainly rely on identical witnesses, evidence and financial data"). Moreover, if the United States prevails in the criminal case, the civil defendants will likely be estopped from litigating the merits of the SEC's allegations (or at the very least substantially narrow the issues to be litigated in the civil case). In addition, the transcripts and exhibits from the criminal case will ultimately made available to the civil parties, which should significantly reduce the duration, cost and scope of civil discovery. These are not hypothetical benefits because the criminal proceedings are already underwear. *See id.* In short, this factor weighs in favor of the United States' requested stay.

2. ***The public interest weighs in favor of unimpeded resolution of the criminal case.***

Federal courts have routinely recognized that the interests of justice weigh in favor of staying parallel civil proceedings because of the various ways in which those proceedings can impede the efficient and proper resolution of the criminal case. This is especially true where there are parallel criminal and SEC enforcement actions that were pending simultaneously. *See, e.g.*, *Telexfree*, 52 F. Supp. 3d at 352-53 (granting motion for intervention and staying SEC action); *SEC v. Purchasers of Secs. In Global Industr., Inc.*, 2012 WL 5505738, at *3-6 (S.D.N.Y. Nov. 9, 2012) (same); *SEC v. Gordon*, 2009 WL 2252119, at *3-6 (N.D. Ok. July 28, 2009) (same); *SEC v. Ott*, 2006 U.S. Dist. Lexis 86541, at *7-10 (D.N.J. Nov. 29, 2006) (same); *SEC v. Beacon Hill Asset Management LLC*, 2003 WL 554618, at *1-2 (S.D.N.Y. Feb. 27, 2003) (same); *In re Worldcom, Inc., Sec. Litig.*, 2002 U.S. Dist. LEXIS, at **14-29 (S.D.N.Y. Dec. 5, 2002) (same); *SEC v. Downe*, 1993 U.S. Dist. LEXIS 753, at *44 (S.D.N.Y. Jan. 26, 1993) (same).

Indeed, for decades courts have understood that the public interest is served by allowing the criminal case to be resolved first. As the Fifth Circuit explained more than fifty years ago:

> The very fact that there is a clear distinction between civil and criminal actions requires a government policy determination of priority: which case should be tried first. *Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.*

Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962) (emphasis added); *see also United States v. Hugo Key & Son, Inc.*, 672 F. Supp. 656, 658 (D.R.I. 1987) (citing "public interest" in law enforcement); *In re Ivan F. Boesky Secs. Litig.*, 128 F.R.D. 47, 49 (S.D.N.Y. 1989) ("the *public interest* in the criminal case is entitled to precedence over the civil litigant") (emphasis in original). This long-recognized public interest no less applies here too.

A key consideration favoring the resolution of criminal cases and staying parallel civil actions are the different discovery and procedural rules that apply in criminal and civil cases. Those differences cease to be respected if a defendant is able to use civil discovery to evade the stricter criminal rules of discovery. In particular, courts have expressed concern that defendants may "abuse" the rules of civil discovery to circumvent criminal discovery rules. *See, e.g.*, *Telexfree*, 52 F. Supp. 3d at 352 ("staying the civil proceedings would prevent the criminal defendants from exploiting the liberal civil discovery rules to obtain evidence to support their criminal defenses"); *United States v. Phillips*, 580 F. Supp. 517, 520 (N.D. Ill. 1984); *Founding Church of Scientology v. Kelley*, 77 F.R.D. 378, 380 (D.D.C. 1977) (citations omitted). For example, the *Jencks Act* strictly limits the disclosure of statements of a government witness in a criminal case – a witness' grand jury testimony or statements made during interviews – cannot be the subject of subpoenas, discovery or inspection until that witness testifies on direct examination. 18 U.S.C. § 3500. Federal Rule of Criminal Procedure 16 specifically carves out *Jencks* material, stating explicitly that the rule does not "authorize the discovery . . . of statements made by government witnesses or *prospective government witnesses* except as provided in [the *Jencks Act*]." Fed. R. Crim. P. 16(a)(2) (emphasis added). This statutory limitation cannot be overridden by the trial court – doing so amounts to legal error. *See, e.g.*, *In re United States*, 834 F.2d

283, 287 (2d Cir. 1987) (district courts lack the power to order early *Jencks* disclosure); *United States v. Taylor*, 802 F.2d 1108, 1117-18 (9th Cir. 1986) (same). But the more liberal rules of civil discovery would arguably allow defendants to entirely bypass the strictures of Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

This is equally true with respect to requests for documents or witnesses that would be generally permissible in civil cases (the pejorative "fishing expedition") but are not in criminal cases. *See, e.g.*, *United States v. McCaskill*, 48 Fed. Appx. 961, 962 (6th Cir. 2002) (defendant not automatically entitled to Rule 17(b) subpoena absent showing that a witness is necessary to present an adequate defense, which requires a showing that the testimony or information is "relevant, material and useful to an adequate defense"); *United States v. Moore*, 917 F.2d 215, 230 (6th Cir. 1990) (same); *United States v. Reid*, No. 10-20596, 2011 U.S. Dist. LEXIS 123554, at **9-10 (E.D. Mich. Oct. 26, 2011) (denying subpoena for certain documents because they were not "evidentiary and relevant").

There is also the public interest in preserving the defendants' assets (to the extent they have any remaining) as a source of payment of potential restitution orders. "Given the enormity of the losses at issue here, this is an important consideration. When a defendant faces a criminal prosecution that is likely to accomplish as much if not more than can be achieved through civil litigation, there is little reason to deplete his resources through payment of attorney's fees to defend or participate in civil litigation that, while important, is essentially duplicative." *In re Worldcom*, 2002 U.S. Dist. LEXIS 23172, at **27.

3. The defendants in the civil case will not be prejudiced by a stay.

The United States' proposed stay would not prejudice any of the defendants in the civil case. *First,* a stay of discovery will not prevent any defendant from pursuing a motion to dismiss (or any other pre-discovery dispositive motion) if they believe they have been improperly named in the civil case. *Second*, as one district court recently recognized in a similar context, "[a] stay in the civil enforcement proceeding will allow defendants to avoid substantial litigation costs while the criminal proceeding is pending." *Telexfree*, 52 F. Supp. 3d at 353. *Third*, resolution of the criminal case would likely narrow the issues to be litigated in the civil enforcement action, thus expediting its resolution.

4. Because the civil and criminal cases are based on the same facts, all discovery should be stay.

Because there is a near-total overlap of facts and evidence in the civil and criminal cases (the same alleged investment scheme underlies both the criminal indictment and civil complaint), the United States respectfully suggests that the Court should impose a complete stay. A complete stay would not only be simpler to administer but would also promote greater efficiencies by avoiding the need for unnecessary piecemeal litigation over tangential discovery disputes. Absent a total stay of discovery, the Court would be called upon to review disputes about whether discovery falls within a barred category, or whether a specific discovery requests should be subject to the stay. Such litigation would unnecessarily waste judicial resources.

5. *A stay would promote judicial efficiency and further the Court's interest in managing its dockets and resources.*

As detailed above, a stay would not only help the litigants avoid duplicative efforts and engage in needless litigation but the Court as well. As one district court recently observed:

> A stay would also conserve judicial resources and narrow the issues to be resolved in the event that criminal convictions are obtained. Under such a scenario, defendants would be estopped from re-litigating issues decided against them. This will undoubtedly expedite resolution of the civil action once the stay is lifted, even with respect to the individual defendants in the civil case who are not criminal defendants. As another district court opined when issuing a similar stay

Telexfree, 52 F. Supp. 3d at 353; *see also In re Worldcom*, 2002 U.S. Dist. LEXIS 23172, at **24-25. *Telexfree*'s observation is no less true here—expedient and efficient resolution of both the criminal and civil cases will help conserve the Court's resources. Such efficiency is best achieved by staying the civil proceedings while the criminal case runs its course.

CONCLUSION

For the foregoing reasons, the United States' motion to intervene and stay discovery in the present civil case should be granted.

Respectfully submitted,

CARTER M. STEWART
United States Attorney

/s/Alex R. Sistla
ALEX R. SISTLA (241760 CA)
Assistant United States Attorney
Federal Building
200 West Second Street, Suite 600
Dayton, Ohio 45402
Telephone: (937) 225-2910
Fax: (937) 225-2564
alex.sistla@usdoj.gov

Dated: January 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 22nd day of January 2016 on counsel of record via the Court's ECF system. A copy of this motion was also sent by United States mail to William M. Apostelos and Connie M. Apostelos.

/s/Alex R. Sistla
ALEX R. SISTLA (241760 CA)